Supreme Court, U.S.
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No. 92-1369

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOSEPH ALBERICI AND THERESA ALBERICI, H/W

v.

SAFEGUARD MUTUAL INSURANCE COMPANY, ET AL.

PRO SE PETITIONER JOSEPH ALBERICI'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

Joseph Alberici and Theresa Alberici,

Petitioners

Safeguard Mutual Insurance Company

PA. Insurance Guaranty Association

General Accident Fire and Life Insurance Corp., LTD.

Insurance Placement Facility of Pennsylvania

Quaker State Mutual Insurance Group

Home Mutual Insurance Company of Pennsylvania

Respondents

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PRO SE PETITIONER JOSEPH ALBERICI'S

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

ARGUMENT

On Saturday, March 20, 1993, pro se petitioner, Joseph Alberici, received Respondents' Brief in Opposition from the Cockle Printing Co., Omaha, Nebraska. In its TABLE OF CONTENTS, Respondents, at page iii, Section X, Subsection A, Subdivisions 2 and 3 state:

A. THIS COURT IS WITHOUT JURISDICTION TO ISSUE THE REQUESTED WRIT OF CERTIORARI.

1. . . . . .

2. There is no Substantial Federal Issue to be Determined by this Court.

3. Petitioners Failed to Raise Any Substantial Federal Issue in the Proceedings Below.

The COUNTERSTATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED (p. 2, paragraph VI) states:

> "Finally, an examination of the record in this case will reveal that Petitioner has failed, completely, to raise or preserve a substantial issue during the State Court proceedings. Only now, when confronted with the need to concoct some basis for this Court to exercise jurisdiction, has Petitioner come forward with the alleged constitutional violations of which he now complains. The failure to raise and preserve a Federal issue in the proceedings below precludes review of such issues here. As such, this Court is without jurisdiction to hear this case."

Petitioner disagrees with this assertion. It is misleading and untruthful. Plaintiffs have repeatedly raised Federal issue in the proceedings below. The issues

appear in Plaintiffs' Memorandum of Law on their Objections to the Defendant's Request for Admissions and Summary Judgments in the Lower Court. Plaintiffs'/Appellants' Briefs to the Pennsylvania Superior and Supreme Courts all indicate and state substantial Federal issues and constitutional violations. Memorandum of Law, Appendix A.

Respondents' COUNTERSTATEMENT OF THE CASE (Section VIII, page 3, second paragraph) states: After the fire, Mr. Alberici... submitted claims to the various insurers covering the fire risk. In sworn proofs of loss submitted to the insurers, Mr. Alberici stated that the cause of the fire was "unknown to insureds."

The fourth paragraph states: The indictment charged Mr. Alberici with engaging in a scheme to defraud his insurance companies by hiring arsonists to burn the movie theatre, so that he could recover the fire insurance proceeds from the policies covering the theatre.

The Federal Indictment against petitioner alleged in Count I paragraph (D) and (E) state that the Quaker State Mutual and Eastern Mutual Insurance Companies were part of the scheme. The record showed, however, that no claim was made by petitioner against either of these companies. At the Federal trial of petitioner, the arsonists, Charles Allen and Vincent Fardella, testified that petitioner allegedly hired only Joseph DiTizio to perform the alleged arson. Allen and Fardella stated that they did not know Alberici and never met the man. Although Quaker State Mutual and Eastern Mutual Insurance are named in the indictment scheme of Count I, petitioner was not indicted for filing claims against them. Instead, the Federal prosecutors deceitfully and wrongfully manipulated and indicted petitioner for Count V and Count VI for these two insurance companies, to which petitioner did not submit a proof of loss with "unknown to insureds" and a policy never existed with

Count V in the lower court.

By any stretch of the imagination, how can the indictment scheme of Count I incorporate a policy, sworn proof of loss (stating "unknown to insureds") when no policy or sworn proof of loss were ever attached to the Indictment, nor produced to the Grand Jury? How can Count V be supported without a document?

The above are new supplemental issues raised by Respondents to intentionally misrepresent and fraudulently lie.

In the sixth paragraph (page 4) Respondents state: "Meanwhile, the insurers, Respondents here, pleaded defenses of fraud and arson to the suit brought on the fire insurance policy. Interestingly, the insurers plead this four years before petitioner was indicted. If Respondents are allowed to use supplemental new issues not of record in the lower court after twelve (12) years, the petitioner should have the right to raise a new issue.

Respondents intentionally and deceitfully failed to mention that Counts I, II, III, IV and VI of the Federal Indictment which incorporate all the issues they raise for a defense were voluntarily dismissed by the Federal prosecutors and Judge Pollak without petitioner's input or knowledge. Petitioner's counsel, the Federal Prosecutors and the Judge suppressed from petitioner the dismissal of these five counts on October 11, 1985. In fact, petitioner was repeatedly directing his attorney to press for a new trial. Petitioner did not discover the dismissal until sometime in 1987 when he reviewed the Court docket and records at the Federal Courthouse. Thus, petitioner is innocent of these charges, the indictment and its scheme.

Moreover, the document introduced to support Count V is a despicable, intangible and irrelevant document which was deceitfully and fraudulently substituted at trial with a different fabricated and intangible document;

Exhibit 12 which bears on it a false and fraudulent "Received" stamp that erroneously and fatally convicted and sentenced petitioner. Additionally, neither Count V or Exhibit 12 contained any documents or words stating policy, concealment of fraud, sworn proofs of loss, or "unknown to insureds" in the mail fraud case or the civil case.

Respondents used these lying, false and fraudulent words on April 2, 1990 in their Cross-Motion for Summary Judgment, Memorandum of Law filed five and one-half months later on August 27, 1990 in violation of Local Rules, Pennsylvania Superior and Supreme Court Rules of Appellate Procedure. This was intentionally done to dupe the Courts for a favorable decision.

Now, the Respondents are attempting to mislead this Honorable Court into believing their lies. Respondents in their Appendix have introduced Exhibits A, B and C to help prove their defense on Count V. It makes common sense that if a policy, proof of loss

or "unknown to insureds" their main defensive argument existed in the lower court record No. 78-10515, Respondents surely would have also introduced them as exhibits. In doing this, they would have avoided this expensive, aggravating hassle and unusual delay. At the very least, they could have submitted an affidavit or verification to substantiate their argument. But, Respondents have no evidence whatsoever to substantiate their false defensive argument.

The strange, suspicious and unusual part of this is that petitioner filed a Pennsylvania "Black Letter Law" Motion to Strike Respondents' Supplemental Reproduced Record and Portion of Respondents' Brief on June 3, 1991. The Motion was hastily denied by the Superior Court of Pennsylvania, Per Curiam, within seven (7) days on June 10, 1991, without even waiting for Respondents to answer, which they intentionally refused to do. Pennsylvania Rules of Civil Procedure, Rule 123(b) requires the filing of an Answer

within seven (7) days of service. Petitioner's attorney intentionally suppressed the Order of Denial from Petitioner for five weeks and intentionally was negligent in failing to raise the lying issues at the panel argument, although the Order states that the issue could be raised at Argument on July 16, 1991. Also, petitioner told his attorney several times to raise the lying issues in Argument before the panel and again at the Courthouse shortly before the argument of the case.

Respondents included in the Appendix as Exhibit "A" the Superior Court's Judgment, Order and Memorandum of 35 pages, which includes Petitioner's Indictment, although this is not included in their Table of Contents.

The Indictment states that:

"THE GRAND JURY FURTHER CHARGES (COUNT FIVE) THAT:

1. Paragraphs 1 through 4 of

Count One are hereby incorporated by reference."

This statement is being intentionally and manipulatively misconstrued by the Respondents. Respondents want to lead this Honorable Court into believing this means that Count V on page 10 of the Indictment is incorporated by reference into the scheme of Count I. In fact, and obviously, the scheme of Count I is to be incorporated into Count V which cannot be because the separated Count V is not even remotely connected with or even mentioned in the scheme of Count I of the Indictment.

It is obvious because the separated COUNT FIVE states:

1. Paragraphs 1 through 4 of Count ONE are hereby incorporated by reference.

2. On or about January 23, 1978 defendant, Joseph Alberici, in the Eastern District of Pennsylvania, having devised this scheme, for the purpose of executing this scheme to defraud, and attempting to do so,

did knowingly and wilfully cause to be delivered by mail, according to the directions thereon, a letter containing Schedules of Value and Loss for a fire loss on August 6, 1977, at 247 Concord Road, Aston Township, Pennsylvania, which letter was addressed to Mr. Steven F. Derrung, Curly (sic) Adjustment Company, 306 Walnut Street, Philadelphia, PA 19106. (Petitioner questions how the Grand Jury arrived at the date of January 23, 1978 when the documents are dated 1977? No one testified before the Grand Jury with regard to Count V). There is no mention here of any lying issue raised by the Respondent and acknowledged by the Superior and Supreme Court, nor is there any mention of this in the scheme of Count I.

The Indictment further states in paragraph (P): "It was further part of the scheme that defendant Joseph Alberici, through the Young Adjustment Company, for the purpose of collecting insurance proceeds for the damage done by the theatre fire would and

did cause proofs of loss, executed by the defendants, to be forwarded to the Insurance Placement Facility of Pennsylvania, the General Accident Insurance Company and Safeguard Mutual Insurance Company. (Q) It was further part of this scheme that defendant Joseph Alberici would and did by the means described in paragraph (P) above attempt to collect $214,244.00 for loss and damage to the theatre caused by the fire, (R). It was further part of this scheme that on the sworn statements and proofs of loss described in paragraph (P) above, defendants Joseph Alberici would and did represent that the cause of the loss occasioned by the August 6, 1977 fire was "unknown to insureds", which respresentations were false and fraudulent in that defendant Joseph Alberici had created a scheme to cause the fire and had performed acts in furtherance of the scheme.

These insurance companies described in paragraphs (P), (Q) and (R) were voluntarily

dismissed by the Federal Prosecutor and the Judge. Thus, they destroyed the Indictment scheme, proofs of loss for damage to the theatre, and fire was "unknown to insureds." Further, anyone can see that the scheme of Count I and paragraphs (P), (Q) and (R) make no mention of the names Curley Adjustment Company, Steven Derrung or Steven Perrone in the scheme of Count I. Neither do paragraphs 1 through 4 mention the names attached to the separated Count V and there is no mention of any insurance company in Count V.

The Pennsylvania Superior Court in A-21 states: "Federal Statute requires specifically that a scheme be devised to defraud and the mails be utilized in furtherance of the artifice to constitute a contravention of the legislation; 1341. Frauds and Swindles, etc. Grand Jury 49(A) document copy, the basis of Count V, was absolutely never mailed.

Further, in Appendix A-18 the Superior Court stated: "Except for paragraph IV(H)-

(N), none of the theories of fraud required any finding of arson on Alberici's part in order to find him guilty. There were alleged alternatives of culpability which were mutually exclusive with regard to the allegation of arson. We conclude that the averment of arson is not essential to the jury's verdict. Harter, supra. As a result, Alberici's conviction could not have been received as conclusive proof of his guilt of arson. This conforms to the Harter v. Reliance Insurance Company decision as stated in Petitioner's Writ of Certiorari.

If Respondents new supplemental lying issues not of record in the lower court have been considered and allowed to remain on record before this Honorable Court, then petitioner's new truthful issue should also be allowed to remain on record for consideration. Joseph DiTizio, the only witness to falsely implicate me in procuring the arson, recently "recanted his testimony" in a Sworn Affidavit under Oath. Mr. DiTizio

states he did NOT participate in the movie theatre arson. He was forced to falsely implicate me by the federal prosecutors and Vincent Fardella to protect his own interest and he did not know Mr. Fardella.

It is incredible that the Respondents, after submitting their fatal, intentional misrepresentation and fraudulent lies to three courts below again submit them to this Honorable Court. Petitioner filed Motions to Strike in each court below (which were completely ignored.) This confirms Respondents' desperation to submit the same lies to this Honorable Court. Especially since they intentionally failed to confirm their lies by attaching an Affidavit or Verification.

It is no wonder that all the original mail fraud evidence and copies are missing and/or destroyed since 1986; missing from the United States Attorney's Office, Judge Pollak's Chambers and the Alcohol, Tobacco and Firearms Bureau Laboratory. Besides the

fact that the Alcohol, Tobacco and Firearms Bureau in Washington, D.C. destroyed these documents, the original Count V Grand Jury 49A document is missing from Safeguard's file.

Petitioner, Joseph Alberici, hereby incorporates by reference herein all the issues raised in his Writ of Certiorari No. 92-1369.

The factual issues herein are authentic, and Petitioner submits a notarized Affidavit to confirm the issues raised herein as Appendix B.

CONCLUSION

Therefore, Petitioner requests that this Honorable Court grant him certiorari.

_____

Joseph Alberici

APPENDIX

APPENDIX A

IN THE COURT OF COMMON PLEAS

OF DELAWARE COUNTY, PENNSYLVANIA

CIVIL ACTION - LAW

JOSEPH ALBERICI AND THERESA ALBERICI, h/w	:	NO. 78-10515
vs.	:	
SAFEGUARD MUTUAL INSURANCE COMPANY, et al.	:	FILED 8/10/88

PLAINTIFFS' MEMORANDUM OF LAW

ON THEIR OBJECTIONS TO THE

DEFENDANTS' REQUEST FOR ADMISSIONS

PROCEDURAL HISTORY

Defendants filed a Request for Admissions under Rule 4014. Plaintiffs filed an objection to the Request for Admissions. Defendants then filed a motion to determine the sufficiency of Plaintiffs' responses to their request for admissions. Plaintiffs filed a response to that motion and now file this Memorandum of Law in support thereof.

REVIEW OF DEFENDANTS' REQUEST FOR ADMISSIONS

The Defendants' Request for Admissions in essence sets forth the various paragraphs of the indictment in Criminal No. 82-00267 in the Eastern District of Pennsylvania, specifically those paragraphs in Count I, and then requests Plaintiffs to admit that Plaintiff, JOSEPH ALBERICI, did each and everything detailed in the indictment. The request is aimed toward proving that if MR. ALBERICI was convicted of certain crimes in regard to the alleged arson of the Jerry Lewis Theatre, then he is not capable of collecting on the insurance policy.

Plaintiffs objected to these requests as the use of the criminal conviction in this case is not proof of comparable facts in this civil case and in effect should not control the outcome of this case.

THE ISSUE OF COLLATERAL

ESTOPPEL AND ITS EFFECT IN THIS CASE

The Supreme Court in Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L.Ed. 2D 469

(1970) defined Collateral Estoppel:

"Collateral Estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. 397 U.S. at 443.

In regard to the present case, the Defendants cl;aim that collateral estoppel will prevent the Plaintiff, JOSEPH ALBERICI, from collecting the insurance proceeds for two reasons:

1. That he procured the alleged arson; and
2. That he fraudulently submitted claims under the fire insurance policies.

If we are to adhere to the definition of collateral estoppel in Ashe, supra, then we must determine if two ultimate facts were determined in the previous criminal case:

1. Did MR. ALBERICI submit fraudulent claims under the insurance policies?
2. Did MR. ALBERICI commit arson or procure arson?

Looking first at the facts regarding the alleged submission of fraudulent claims we see the following:

Plaintiff, Joseph Alberici, believes that a step-by-step dissection of the indictment and its comparison against the physical evidence and testimony offered by the government at trial will show the Court that the conviction is not based on grounds adequate to deny Plaintiff the proceeds of the policies.

Plaintiff disputes the allegations in paragraphs one (1) through three (3) of the indictment only insofar as they ignore the fact that Co-Plaintiff, Theresa Alberici, also put up the purchase money for the premises at 247 Concord Road, Aston.

Paragraph four (4) of the indictment

alleges that Plaintiff "did devise a scheme and artifice to defraud and obtain money" by false means. Paragraph four (4) is then subdivided into letter paragraphs A through R which purport to define or more fully set out the alleged scheme.

(1) Paragraphs A through F allege that Plaintiff purchased the following fire insurance policies which have the following purchase and expiration dates:

Purchase Date	Company	Amount	Exp. Date
5/14/77	Safeguard Mutual	$100,000	8/14/77
7/15/77	Ins. Place. Facility PA	100,000	7/15/78
7/25/77	General Accident	125,000	7/25/78
7/26/77	Quaker State Mutual	75,000	7/26/78
7/26/77	Eastern Mutual	75,000	7/26/78
8/02/77	Safeguard Mutual (Contents)	25,000	7/26/80

Initially, the fact that is very interesting to note is that Counts 1, 2, 3, 4 and 6 of the indictment were dismissed by an order of District Judge Pollak dated October 11, 1985. In regard to the above insurance companies the dismissed counts correlate as follows:

Count No.	Insurance Company
1	Safeguard Mutual
2	Insurance Place. Facility
3	Safeguard Mutual
4	General Accident

There were no counts charging Plaintiff with anything insofar as either Quaker State Mutual or Eastern Mutual Insurance Companies were concerned.

Therefore, there was no insurance company which was found to be defrauded.

By his action Judge Pollak in fact shattered the alleged "scheme" of the indictment so that no scheme could exist where the remaining Count (Count 5) could not refer to items that were dismissed and where its allegations (Count 5) referred only to Mr. Horowitz allegedly writing a letter to a man who did not exist (Mr. Derrung) and who was employed by a non-existent company ("Curly Adjustment Company") (sic) and which letter Mr. Horowitz could not even say he mailed.

There was one count, number five (5), of which Mr. Alberici was found guilty. The

question then must be: Does Count Five relate to any insurance company?

In summary, Count Five alleges that on or about January 23, 1978, Mr. Alberici caused a letter to be delivered by mail containing schedules of value and loss for the Jerry Lewis fire of August 6, 1977, to "Mr. Steven F. Derrung, Curly Adjustment Company, 306 Walnut Street, Philadelphia, PA 19106."

The person that Mr. Alberici is alleged to have caused to have sent the letter is Bertram Horowitz, Esquire, an owner and adjuster for the Young Adjustment Company. Several specific facts regarding this letter stand out:

1. It was addressed to Mr. Steven Perrone not Mr. Steven F. Derrung, as the indictment indicates.

2. The Curly Adjustment Company is spelled "Curley" not "Curly", as noted in both Mr. Horowitz's letter and the indictment.

3. That the letter used at trial as Exhibit 12 had letterhead, a purported signature of Mr. Horowitz by Joyce Brown and a receipt stamp of Curley Adjustment Bureau. This was not the letter submitted to the Grand Jury as Exhibit 49(a) and, therefore, varies from the evidence upon which the indictment was drawn. Exhibit 49(a) had no letterhead on it, no signature and no rceived stamp.

4. That Mr. Horowitz had previously written to Safeguard on November 2, 1977, and it was not necessary to write to Mr. Perrone on January 23, 1978, when Safeguard had already denied the Alberici claim on October 12, 1977, and on October 14, 1977. Safeguard had cancelled its remaining contents policy with Plaintiff effective October 29, 1977, which policy was covered under Count 1. The other policy had lapsed.

5. Mr. Perrone closed his file and terminated his representation for and of Safeguard by his letter dated October 19,

1977; therefore, he was not working for Safeguard on January 23, 1978, nor their agent. A letter to him, therefore, could not be pat of a scheme to defraud Safeguard.

6. On January 26, 1978, Mr. Perrone reiterated that his file was closed as to Safeguard and sent a copy of his letter to Young Adjustment Co.

Further, in a deposition dated February 12, 1988 (pp. 5-7) Mr. Horowitz said Mr. Alberici did not seek out him, rather he sought out Mr. Alberici. That is definitely not what one would consider as conduct for a party who is allegedly scheming to defraud.

Mr. Horowitz also pointed out the following facts:

1. It was his contractor, not Mr. Alberici, who established an estimate of the loss.

2. His letter of January 23, 1978 was not sent by certified mail to Mr. Perrone.

3. That there is nothing to indicate that his letter of January 23, 1978 was ever

mailed.

4. That sometime after January 23, 1978, Mr. Horowitz at a deposition of Mr. Alberici found that there were two additional insurance companies (Quaker State and Eastern Mutual) that Mr. Alberici never told him about and for which no proofs of loss or claims had been filed.

5. That Mr. Horowitz had no personal recollection of signing and mailing the letter of January 23, 1978 to Perrone. (2) Paragraph G merely indicates that the policies noted in Paragraphs A through F were in force on the date of the fire, August 6, 1977.

6. According to an affidavit of Bertram Horowitz dated November 18, 1985, the Plaintiffs did not authorize this letter or know of its existence. In addition, as previously noted on page 6, Plaintiffs had in fact filed their claims on November 1-2, 1977, and the second filing was unnecessary.

"Collateral estoppel is issue

preclusion.... It seeks to prevent the relitigation of a finally litigated issue in a subsequent proceeding between the same parties whether the same or different evidence is to be introduced." Com. v. Hude, Pa., 425 A.2d 313 at 322 (1980).

In this case, the parties are for purposes of this issue, JOSEPH ALBERICI and the various insurance companies.

Looking at the issues in the federal criminal trial, there was an acquittal of Plaintiff as to all issues relevant to the insurance companies. Only Counts 1 through 4 pertained to the insurance companies (as noted previously, he was not even charged with fraud as to two companies that he made claims on).

Taking the argument of the insurance companies one step further (that is, that he was convicted of Count Five, which included by reference and incorporation the numbered and lettered paragraphs of Count One), it could well be argued that he was found not

guilty of Count One and therefore those allegations when incorporated in Count Five had no relevance and did not result in a finding on an ultimate issue.

There is no allegation in Count Five that MR. DERRUNG (who is not even the person the letter was addressed to) works for an insurance company or that he was a person sought to be defrauded. But even if we look to extrinsic evidence, we find that at one time MR. PERRONE (the name of the real person or addressee) worked for SAFEGUARD.

However, MR. ALBERICI was found not guilty of attempting to defraud SAFEGUARD (Counts 1 and 3) and the letter to MR. PERRONE was written subsequent to the time when he was no longer retained by SAFEGUARD.

In fact, the letter submitted to the Grand Jury as Exhibit 49(a) was not the same letter submitted at trial as Exhibit 12. (The Grand Jury letter had no received stamp, no letterhead and no signature, while the letter offered at trial had a received stamp,

letterhead and dots where a signature would be. In essence, while the government did not de facto alter or vary the indictment, it did vary it by offering evidence which differed from that offered to the Grand Jury, and that is a fatal defect under statute, court rules and case law.) What this fact indicates is that a conviction based on evidence not submitted to the Grand Jury cannot be upheld and should not be considered determinative of an ultimate issue. See Russell v. United States, 369 U.S. 749, at 770, 82 S. Ct. 1038,8 L. Ed. 2d 740 (1962).

The second issue sought to be proved by the admissions is whether or not the federal conviction is determinative of whether MR. ALBERICI was guilty of arson or of attempting to procure arson.

Initially, arson is a state crime and not a federal crime. See, 18 Pa. C.S.A., Section 3301. However, there are instances wherein certain actions similar to arson are covered by federal statute: 18 U.S.C.,

Section 844 (and other parts of Chapte 40).

But, these sections were not charged against MR. ALBERICI and, therefore, cannot be determinative of the ultimate issue of whether he caused or procured arson. If the evidence was there to prove them, certainly they would have been charged.

MR. ALBERICI was charged only with mail fraud.

If there was sufficient evidence to prove that MR. ALBERICI was guilty of arson or procuring arson then the District Attorney of Delaware County certainly would have acted on that information.

THE USE OF THE COLLATERAL ESTOPPEL DOCTRINE IS TO BE BASED ON A CASE-BY-CASE ANALYSIS AND THE FACTS IN THIS CASE DO NOT WARRANT IT.

In Hurtt v. Stirone, 416 Pa. 493, 206 A.2d 624 (1965) the Court stated:

> Moreover, there is a growing tendency to decide each case upon its particular facts with a view toward applying the exclusionary rule only where reason

and logic so demand. 206 A.2d at 625.

In Loughner v. Schmeizer, 421 Pa. 283, 218 A.2d 768 (1966) Justice COHEN, in a dissenting opinion, stated:

> I would adhere to the general rule of evidence that would prevent the admission of a conviction of a criminal offense in subsequent civil actions; but if I were to depart from that rule I would require more certain standards than thoise which have been expressed in Hurtt v. Stirone.

In Com. Dept. of Transp. v. Mitchell, 535 A.2d 581 (Pa. 1987), Chief Justice Nix, dissenting stated:

> I have serious reservations as to the correctness of the judgment in Hurtt v. Stirone, 416 Pa. 463, 206 A.2d 624 (1965). The fact that a person is found guilty in a criminal trial should not preclude that individual from contesting his

> guilt of those facts in a civil trial. This does not mean that the fact of the criminal conviction may not be introduced during the subsequent civil trial....
>
> 535 A.2d at 588.

Finally, it appears that the issue of collateral estoppel, if applied in thiscase, would be a travesty of justice as the government's case was not only carelessly drawn and carried out, it amounted to a mockery of justice that an individual could be conviced with such trumped-up, illegal evidence. The technical legal issues that the parties are not the same, the issues are not the same and the facts are not the same, as required for the application of the collateral estoppel rule, wilt before the mockery of justice perpetrated by the government in this case.

THE INDICTMENT AGAINST PLAINTIFF, JOSEPH ALBERICI, WAS LEGALLY INSUFFICIENT, IMPROPERLY FRAMED AND FATALLY DEFECTIVE

"Two of the functions of an indictment are to apprise the Defendant of the charge of which he is accused and to provide protection against reprosecution should an acquittal result." U.S. v. Goldstein, 502 F.2d 526 (1974).

In this case the government presented Exhibit 49(a) (allegedly Horowitz's letter of January 23, 1977), but that letter was not presented as evidence at trial. Instead, Exhibit 12 appeared complete with letterhead, a received stamp and dots where a signature should be. The government in effect varied the indictment when it did this contrary to all procedure. U.S. v. Goldstein, supra, U.S. v. Russell, supra.

U.S. v. Goldstein continues:

> "But there is a third and very important aspect of the indictment process, and that is the duty of the grand jury to shield a citizen from unfounded charges and to require him to appear in court in defense only if

probably cause has been found by that independent body." 502 F.2d at 529.

No person testified before the Grand Jury on the facts regarding Count Five: NOT HOROWITZ, the alleged writer; NOT PERRONE, the alleged receiver (referred to as Mr. Derrung in the indictment); not the office staff of either the alleged writer or the alleged receiver to show that the ltter was mailed, was received or in what manner it was delivered.

Goldstein continues further:

"Thus a conviction of a defendant cannot be upheld on the basis of facts not found by and perhaps not even presented to the grand jury which indicted him." 502 F.2d at 429.

"No person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury...." 502 F.2d at 530.

The indictment Count 1, subparagraph Q, alleges that Joseph Alberici attempted to

collect $214,244.00 for loss and damage to the theatre by fire but the indictment failed to charge him with any wrongdoing as to Quaker State and Eastern Mutual (Home Mutual) and if those two companies are not included then the amounts that they respectively pay, $29,756.15 and $29,756.15, for a total of $59,512.30, which would really mean that the allegation should have been $154,727.709, not $214,240.00.

Paragraphs H through J of the indictment indicate that the Plaintiff called Joseph DiTizio on July 28, 1977, for the purpose of asking him to arrange for setting a fire in the theatre and that on the same date DiTizio contacted Charles Allen to help him and that Allen contacted Vincent Fardella (a/k/a Vincent Mayo) for his help.

But the following contradiction appears in testimony:

In his testimony at the federal court trial, Joseph DiTizio stated that he called Mr. Alberici, not that Mr. Alberici called

him. He also stated that he never actually spoke with Mr. Alberici on the phone.

Paragraphs K through M of the indictment allege purchase, transportation and use of naptha and acid to set fire to the Jerry Lewis Theatre.

But the lab reports and the laboratory evidence receipt and the Aston Township Police Supplement Report indicate only one 55-gallon drum which contains phenol, not naptha. But the testimony at the Grand Jury and at trial indicated that 55-gallon drums of naptha were transported. Where were the drums of naptha?

The Report of Investigation by Agent Lorry includes a statement that 110 gallons of naptha were used but no 55-gallon drums were ever found. This was the basis of the Title XI Determination (explosive substances used in violation of 18 U.S.C., Section 844), to give federal jurisdiction. And the statement of A.T.F. dated April 9, 1979, which could neither identify naptha or gasoline used in the fire.

But the report of Dr. Grant Krow states that the contents of two 55-gallon drums of naptha could not have been used. Even one such drum would have exploded a theatre four and one-half times the size of the Jerry Lewis Theatre. but he indicated that there was not a major explosion destroying the theatre and the lower part of the theatre where the vapors would have collected was undamaged.

In addition, Dino D'Agata, owner of the premises on which Ulmer and Co. alleged sold naptha to Allen and Fardella, says that no naptha was kept on the premises.

The alleged invoice from Ulmer & Co. purposely left off the invoice number and was identified as #1480 at trial, though invoices 14835-14837 were issued the same day. Agent Lorry (Exhibit marked No. 31) indicated that it was Invoice #1480 and that he initialled it but no initials appear on the invoice marked Exhibit 21A.

The alleged expert arsonist, Fardella, left his home phone number allegedly on the

sales invoice #1480 from Ulmer & Co. See Exhibits 21A and 22.

In the A.T.F. Bureau report marked pages 32-33, Allen gave directions as to where he bought the naptha, which took the agents not to Ulmer & Co. but to Sibiski's Auto Body in Bellmawr, New Jersey. On page 68 of the report, Fardella did not even recognize Ulmer & Co. as the place where the naptha was bought. Further, Fardella testified on January 10, 1983, on direct testimony by A.U.S.A. Stephen Wehner that the only reason he knew where the naptha came from was that Mr. Wehner told him.

Mr. Teplick of Ulmer & Co. could not identify the persons who were supposed to have bought the naptha from him and who were there on two occasions; once to order it and once to pick it up.

Vincent Fardella said that there was no explosion at the theatre; he said things completely inconsistent with the alleged presence of 110 gallons of naptha and with Dr. Krow's report and testimony. See page 18 of Fardella's Grand Jury testimony.

See Fardella's trial testimony of January 10, 1983, attached.

Statements by Fardella and Allen indicate that DiTizio was not at the fire scene, was not involved and was not indicted. See copy of indictment of Charles Allen dated February 2, 1980, especially paragraph "S".

Also enclosed herewith are the papers relevant to the lie detector test wherein Fardella said that only Fardella and Allen were involved, not DiTizio and the reason for the lie detector test is shown on the attached letter of August 10, 1981, and the A.T.F. report.

The government on December 23, 1981, admitted on the record that DiTizio was not involved. See also A.U.S.A. Stephen V. Wehner's letter dated January 4, 1982.

On January 18, 1982, Judge Pollak granted the motions of DiTizio to sever the case, indicating that he believed the testimony of Fardella that DiTizio was not present and the other evidence offered and cited above.

Later, when Fardella was changing his

plea, he said that he, Allen and Di Tizio were at the fire.

Then on other occasion he said only Allen was there; then after constant badgering he said DiTizio was present.

On November 19, 1982, Fardella stated that he did not know DiTizio and that at the arraignment he only knew him because his lawyer told him who DiTizio was.

Finally, the three parties allegedly involved all gave differing statements as to the amounts oif money involved, and Count Five, 49(a) was never related or attached to any insurance company in any litigation involved in the civil and criminal cases.

CONCLUSION

The record of conviction should only be admitted as evidence and not as conclusive proof of the fact that Plaintiff, Joseph Alberici, procured the arson or fraudulently submitted claims under the fire insurance policy. The Requests for Admission are too broad in that they do not specifically look to all the facts which came out in the federal trial but simply attempt to use an

indictment scheme when that indictment scheme was in fact shattered by Judge Pollak's decision and should not be used against Plaintiff.

APPENDIX B

COMMONWEALTH OF PENNSYLVANIA :

SS

COUNTY OF MONTGOMERY :

JOSEPH ALBERICI, being duly sworn according to law, deposes and says that the facts set forth in the foregoing Reply to Respondents' Brief in Opposition are true and correct to the best of his knowledge, information and belief.

Joseph Alberici

JOSEPH ALBERICI

Sworn to and subscribed
before me this 29th day
of March , 1993.

Barbara L Hicks

Notary Public

Notarial Seal
Barbara L. Hicks, Notary Public
Lower Merion Twp., Montgomery County
My Commission Expires March 19, 1996
Member, Pennsylvania Association of Notaries